was that the driver was not a servant or agent of the defendant. After closing the case for the plaintiff, Mr. Thomas, with the Court's permission, then himself gave evidence and proved certain correspondence. On this evidence, I think that I must accept that "Rolando K. Mabbun, who was the driver of the car at the time of the accident, did not have any capacity whatsoever, and if anything, we could only say that his capacity was that of being a member of the defendant's family and as such, he had access to the use of the motor vehicle. However, the journey during which the accident occurred was entirely on Rolando K. Mabbun's account."

Assuming that Rolando K. Mabbun was the son of the defendant and was driving with his authority and permission, that still does not necessarily make him the agent of defendant for the purpose of driving the car. On the contrary, the statement of defendant's advocate, on which Mr. Thomas relies, is to the effect that Mr. Rolando K. Mabbun was making a journey entirely on his own account.

The following passages are cited from the case of *Hewitt* v. *Bonvin* [2] where at p. 191 Mackinnon L.J. said:

"If A suffers damage by the wrongful act of B, and seeks to say that C is liable for that damage he must establish that in doing the act B acted as the agent or servant of C. If he says that he was C's agent he must further show that C authorized the act. If he can establish that B was the servant of C the question of authority need not arise. A master is jointly and severally liable with his servant for any tort committed by the servant in the course of his employment. If in this case the plaintiff is to make Bonvin the father liable for the damages he claims he must establish that the son was driving the car as the servant of his father and in the course of his employment ....

As I see it, the plaintiff, to make the father Bonvin liable must establish, (1) that the son was employed to drive the car as his father's servant, and (2) that he was, when the accident happened, driving the car for the father, and not merely for his benefit and for his own concerns. In my opinion the plaintiff did not establish either of these propositions. The boy took out and used the car, following upon an interview with his mother. Treating the mother as the fully authorized agent of her husband, all that she said or did amounts to no more than: 'I will lend you your father's car for you to use.' He was not employed to drive it as his father's servant, and when the accident happened he was not doing any work of his father's. He was driving his own friend, for his own purpose, and the father had absolutely no interest or concern in what he was doing ....

It is true that if a plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the court is left without further information it is legitimate to draw the inference that the negligent driver was either the owner himself, or some servant or agent of his: *Barnard* v. *Sully* [3]; but in the present case all the facts were ascertained and the judge was not left to draw an inference from incomplete data.

....If I am right as to the law, it follows that the learned judge's decision can be supported if, and only if, the evidence proves that the appellant's son was acting for and on behalf of the appellant. Unfortunately it is not clear that the learned judge applied his mind to this precise question. The judge has found that the son had permission to drive the car, or at least that his mother, who had authority to represent the appellant, knew that he was taking the car, and knew the purpose for which he was taking it. This finding is consistent with a mere loan or bailment of the car. If, however, this Court had thought that on a fair view of the evidence agency was established, it would clearly have been right to dismiss the appeal. In my opinion agency was not proved. Before us counsel for the respondent relied on the fact that the driver of the car was the son of the appellant. Although it would be absurd to say that such a relationship is of itself evidence of agency, I agree that when considered in combination with other circumstances it may be in some cases both relevant and significant. If, for instance, a father consents to his young son inviting a guest to the family home, and then permits him to use the father's car for the entertainment or convenience of the guest, it may well be a justifiable conclusion that the son is driving for and on behalf of the father. Ultimately the question is always one of fact...."

Following the principles laid down in the above case, I find myself in the instant suit unable to draw inference that Rolando K. Mabbun, who was driving the defendant's car No. K. 6373, was so driving as agent of the defendant. In my view plaintiff's counsel would have done better to join Rolando K. Mabbun as a defendant. I cannot hold the present defendant liable for any damage. This action is accordingly dismissed with costs (excepting of course such costs as have already been ordered in favour of plaintiff).

Action dismissed.

Solicitor: *Thomas & Co.*

NASIB SINGH v. PONNUTHURAI

[O.C.J. (Gill J.) January 10, 1964]

[K.L. — Civil Suit No. 750 of 1962]

Bills of Sale—Seal—Requirement of—Description of attesting witness as magistrate—Whether sufficient—Void for non-renewal—Whether covenant contained therein to pay also void—Whether money lent recoverable—Bills of Sale Enactment (F.M.S. Cap. 57) ss. 4, 6, 11, 15—Bills of Sale Ordinance, 1950, ss. 4, 6, 13, 23.

Practice and Procedure—Proceedings by writ of summons—Whether procedure correct—Whether by way of originating summons.

The defendant executed a bill of sale in favour of the plaintiff on November 30, 1951 for a loan of $4000. There was no seal on the bill of sale which was attested by a witness who described himself as "Magistrate, Kuala Lumpur". The bill was first registered on November 31, 1951. It was renewed annually in accordance with the provisions of the Enactment until July 31, 1958. It was next renewed on November 24, 1959 when a period of 12 calender months had elapsed from its last renewed registration on July 31, 1958. No order was obtained from the High Court for extension of time for re-registration of the bill of sale. It was next renewed on April 13, 1962 upon an order of the High Court dated April 2, 1962 whereby time for re-registration was extended until 14 days after the date of the order without prejudice to the rights of the parties acquired prior to the time of actual re-registration. The bill of sale had not been renewed since April 13, 1962.

The plaintiff commenced an action by writ of summons for the recovery of money lent on the security of the bill of sale. It was contended for the defendant that (a) the proceedings should have been commenced by originating summons as required by section 11

(iii) of the Bills of Sale Enactment; (b) the only remedy which a grantee of a bill of sale has is to realise the security and if this proves insufficient he has no further remedy; (c) the claim is barred by limitation as the last payment was made in 1954; (d) the bill of sale was void because it was not sealed and there was no description of the attesting witness.

Held: (1) where the property comprised in a bill of sale, when sold, is not likely to realise sufficient money to satisfy the debt, the grantee is entitled to bring an action by way of writ of summons for the money lent and for an order for the sale of the property;

(2) the mark which the defendant made when signing the bill of sale was a sufficient act of sealing;

(3) the description of the attesting witness was sufficient;

(4) the bill of sale became void for lack of renewal after the expiration of one year from its renewed registration on July 31, 1958;

(5) a bill of sale void for lack of renewal is void only in respect of the chattels comprised therein;

(6) even if the agreement for payment of principal or interest was void, the money lent is recoverable with reasonable interest thereon as money had and received.

Cases referred to:–

(1) *Davies* v. *Rees* (1886), 17 Q.B.D. 408, 411.

(2) *Arnashellum Chetty* v. *Tengachee Nachiar & Ors.* (1906), 10 S.S.L.R. 85.

(3) *Frederick Dunbar Thomas* v. *William John Kelly and Earnest Baker* (1888), 13 App. Cas. 506.

(4) *Smith* v. *Whiteman and Another* [1909] 2 K.B. 437.

(5) *Heseltine* v. *Simmons* [1892] 2 Q.B. 547.

(6) *Bradford Advance Co., Ltd.* v. *Ayers and Wife* [1924] W.N. 152, 153.

ACTION.

Lal Singh for the plaintiff

V. Kandiah Palasuntharam for the defendant.

Cur Adv. Vult.

Gill J.: This is an action for the recovery of money lent on the security of a bill of sale executed by the defendant in favour of the plaintiff on 30th November, 1951. The statement of claim also contains a prayer for the sale of the personal chattels comprised in the bill of sale, but this has now been abandoned.

Mr. Palasuntharam as counsel for the defendant raised a preliminary objection as to the form of proceedings chosen by the plaintiff, his contention being that the proceedings should have been commenced by way of an Originating Summons as required under section 11(iii) of the Bills of Sale Enactment (F.M.S. Cap. 57) and not by way of a Writ of Summons. He further contended that the only remedy which the grantee of a bill of sale has for the recovery of money lent is to realize the security and that if this security proves insufficient he has no further remedy against the grantor of the bill of sale. I must say that this is the most startling proposition of law I have ever heard.

I decided against the preliminary objection because in my opinion section 11(iii) of the Bills of Sale Enactment lays down the procedure to be followed only if the grantee elects to have the chattels comprised in the bill of sale seized and sold for the satisfaction of the debt and does not seek to obtain judgment for the money lent. This is a procedure which a grantee is at liberty to adopt if in his opinion the amount realized by the sale of the property will more than satisfy his debt. It is to be observed that the provisions of the section are permissive and not mandatory. Where the property when sold is not likely to realize sufficient money for the satisfaction of the debt, the grantee, in my judgment, is entitled to bring an action by way of a Writ of Summons to obtain judgment for the money lent and at the same time to ask for an order for sale of the property, so that if the amount realized by sale proves insufficient he can take execution proceedings to recover the balance. Moreover, procedure by way of Originating Summons is not suitable where there are disputed questions of fact.

Coming to the merits of the case, there is a dispute as to the amount actually lent. The plaintiff says that he lent a sum of $4,000 which was paid to the defendant as to $1,000 in cash and as to the balance by two cheques of $2,000 and $1,000 respectively, the cheque for $1,000 being postdated at the defendant's request by four or five days. He says further that the money and the cheques were placed on the table of the Magistrate who attested the bill of sale and that the defendant took the money from the table. The defendant, on the other hand, says that he received only $3,000 by way of two cheques for $2,000 and $1,000 respectively. Enche' Harun bin Idris who attested the bill of sale has given evidence to say that consideration passed in his presence. He said that he remembered the parties because of the rather large amount lent. On the balance of probabilities, and in view of the evidence of Che' Harun, I am satisfied and find as a fact that the actual sum lent was $4,000.

As regards repayments, the plaintiff says that he noted in his books, which were put in as Exhibits P.3, P.4, P.5, P.6 and P.7, whatever payments were made and that there is now due from the defendant a sum of $3,700 towards principal and a sum of $3,413 towards interest, making a total of $7,113. A very comprehensive statement of account as to how these amounts are arrived at was annexed to the statement of claim which was served on the defendant. The defendant, on the other hand, says that he paid off the full amount due by 1954. At first he paid only interest but later he started paying $200 a month towards principal together with the interest due. However, he has not produced a single receipt to show any of the payments made.

Moreover, there were at least five notices of demand sent to him starting in the year 1956, to none of which he replied stating that the amount had been paid off, although he is able to read and write English. A number of cash cheques issued by the defendant to the plaintiff were brought out during the cross-examination of the plaintiff. All these cheques were dishonoured when presented for payment. The last of these cheques is dated 12th July, 1955. I do not for one moment believe that a man who was issuing cheques which when presented were dishonoured was likely to have paid off the debt. I do not accept his story that he obtained cash on these cheques from the plaintiff and that they were in no way related to the loan transaction. In the circumstances I am satisfied that the plaintiff has proved his claim as to the amount due.

The defendant further contends that, even if the amount is due, the whole claim is barred by limitation. This contention, of course, is based on his assertion that the last payment was made in 1954 but I am satisfied on the evidence that the last payment was made in 1957 as alleged by the plaintiff. This was less than six years before this action was filed, so that the claim is not barred by limitation.

The claim is lastly resisted on the ground that the bill of sale was void in that it was not made in the form in the schedule to the Bills of Sale Enactment as required by section 6 of that Enactment. It is alleged that the bill of sale was not sealed and that there was no description of the attesting witness. Undoubtedly there was no seal on the bill of sale but it is trite law that the sealing of a deed need not be by means of a seal; it may be done with the end of a ruler or anything else, nor is it necessary that wax should be used. In other words, any act done with the intention of sealing is sufficient. The mark which the defendant made when signing the bill of sale, in my opinion, was a sufficient act of sealing. As regards attestation, the name of the attesting witness, Harun bin Haji Idris, was written out in the attestation clause and the words "Magistrate, Kuala Lumpur" over which he signed formed part of the clause. There was thus a sufficient description of the attesting witness. Description of an attesting witness in the context surely does not mean the colour of his eyes or the shape of his nose. I therefore hold that the bill of sale when executed was not void and that it was duly registered on the day on which it was executed.

Although I have said that the bill of sale was not void when it was first registered, it seems clear that it became void subsequently for lack of renewal. In this connection section 15(i) of the Bills of Sale Enactment provides as follows:

"The registration of every bill of sale must be renewed at least once in every twelve calendar months, and if a period of twelve calendar months elapses from the date of registration or last renewed registration of a bill of sale without a renewal or further renewal (as the case may be) the bill of sale shall become void."

The Bills of Sale Enactment was repealed by the Bills of Sale Ordinance, 1950 which was brought into force with effect from 1st January, 1959. Section 23(2) of the Ordinance provides as follows:

"Any renewal after the commencement of this Ordinance of the registration of a bill of sale executed before such commencement, and registered under any Ordinance or Enactment repealed by this Ordinance, shall be made under this Ordinance in the same manner as the renewal of a registration made under this Ordinance."

A renewal of registration of a bill of sale under the Ordinance is required under section 13(1) which is identical with the section in the Enactment relating to renewal.

As I have stated above, the bill of sale was first registered on 31st November, 1951. It was renewed year after year strictly in accordance with the provisions of the Enactment until 31st July, 1958. It was next renewed on 24th November, 1959 when a period of twelve calendar months had elapsed from its last renewed registration on 31st July, 1958. No order was obtained from a Judge of the High Court for extension of time for re-registration of the bill of sale. Consequently, the renewed registration of the bill of sale was void, which had the effect of rendering the bill of sale itself void. Nonetheless, it was next renewed on 13th April, 1962 upon an order of the High Court dated 2nd April, 1962 whereby the time for re-registering was extended until 14 days after the date of the order. This order was made without prejudice to the rights of the parties acquired prior to the time of actual re-registration which, as I have said, was on 13th April, 1962. The bill of sale has not been renewed since 13th April, 1962 so that more than a year has lapsed since its last renewal. Even if the order of the High Court dated 2nd April, 1962 rectified the defect as regards re-registration, as of today the bill of sale is void for lack of renewal, although the correct position, in my opinion, is that it became void after the expiration of one year from its renewed registration on 31st July, 1958.

The question which I have now to decide is, what is the effect of the bill of sale becoming void for lack of renewal? It is contended on behalf of the defendant that if the bill of sale is void it is void altogether, so that a covenant contained in it for the payment to the grantee of the principal and interest thereby secured is rendered void as against him. In other words, the agreement for payment of principal or interest contained in the bill of sale cannot be enforced. There is support for this view in a number of English authorities which turn on the construction and interpretation of section 9 of

the Bills of Sale Act (1878) Amendment Act, 1882. This section provides that "a Bill of Sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed". In *Davies* v. *Rees* [1] the Court of Appeal held that a bill of sale which is not in accordance with the statutory form is void altogether. Lord Esher, M.R., however, stated in the course of his judgment that there was an implied agreement to repay the money lent, independently of the bill of sale. His Lordship went on to say that "it was not intended by the Act that the borrower should be able to keep the money which he had borrowed in his pocket because the bill of sale was made void." This view of the law was followed by Thornton J., in the Penang case of *Arnashellum Chetty* v. *Tengachee Nachiar and four Others.*[2]

In *Frederick Dunbar Thomas* v. *William John Kelly and Earnest Baker* [3] the House of Lords held that a bill of sale not in accordance with the form as required by section 9 of the 1882 Act was altogether void. That was a case in which the bill of sale included in the body of the instrument an assignment of future and after acquired chattels, as well as an assignment in general terms of existing chattels in or about the mortgagor's premises other than those specifically described in the schedule. I mention this case because counsel for the defendant, on the strength of this case, put forward the ingenious argument raised in his preliminary objection that the rights of a grantee of a bill of sale for the recovery of his money are confined to the chattels comprised in the bill of sale, because to give him judgment for any balance not recovered by the sale of the chattels would be tantamount to giving the grantee a right by way of execution over other and future or after-acquired chattels of the grantor. In *Smith* v. *Whiteman and Another* [4] the Court of Appeal said the same thing about the bill of sale being completely void.

I have referred to the above cases in deference to the arguments put forward by learned counsel for the defendant, but as far as this case is concerned, in my opinion they are purely of academic interest, because they turn on the interpretation of section 9 of the English Act of 1882, the terms of which are not quite the same as the provisions of section 6 of our Bills of Sale Enactment. This section reads as follows:

> "Subject and without prejudice to the other provisions of this Enactment for invalidating bills of sale, every bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void in the following cases —
>
> (a) if the amount the payment of which is thereby secured is less than one hundred dollars; or
>
> (b) if it is not made in the Form A in the Schedule."

Section 4(i)(a) of the Enactment provides as follows:

> "4 (i) Every bill of sale shall be attested and registered as provided in this Enactment and shall truly set forth the consideration for which it was given, otherwise the following consequences shall ensue —
>
> (a) in the case of a bill of sale made or given by way of security for the payment of money by the grantor thereof, such bill of sale shall be void in respect of the personal chattels comprised therein;".

The corresponding provisions in the Bills of Sale Ordinance, 1950 are also contained in sections 6 and 4 of the Ordinance and they too have the same effect. These two sections when read together make it quite clear that the bill of sale on which this action has been brought is void only in respect of the chattels comprised therein. *Halsbury's Laws of England* (Third Edition), Volume 3, page 307 says: "If, however, a bill of sale is avoided only in respect of personal chattels comprised therein, it remains available for the enforcement of agreements for payment of principal and interest." This statement of the law is founded on the decision of the Court of Appeal in England in *Haseltine* v. *Simmons,*[5] which turned on the construction and interpretation of section 8 of the Bills of Sale Act, 1882. That section reads as follows:

> "Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof or if it is executed in any place out of England then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

It will be observed that section 4 of our Enactment corresponds more nearly to section 8 of the English Act rather than to section 9.

I must say in conclusion that even if I accept the view that the bill of sale is void, so that the agreement for payment of principal or interest contained in it cannot be enforced, the money lent is recoverable with reasonable interest thereon as money had and received. I find support for this in the following words of Bailhache J. in *Bradford Advance Co. Ltd. v. Ayers and Wife* [6]:

> "At first sight it would seem that the bill of sale being void, and the covenant to pay interest being therefore void, that the liability to repay the principal had also gone. But that is not so. An action would lie for money had and received, and that action would lie apart from contract or negotiation on the facts of the case, namely, that the plaintiffs had lent the defendant 100 pounds, and in those circumstances an obligation to repay the loan arises, and that obligation carries with it an obligation to pay interest at a reasonable rate, which I put at 5 per cent."

In this case the interest agreed upon was at the rate of 18% per annum but the interest claimed is 12% which, in my opinion, is a reasonable rate. Whatever view I take of this case, the plaintiff is entitled to succeed on his claim. There will

therefore be judgment for the plaintiff for $7,113 with interest at 6% per annum to the date of realization and taxed costs.

Judgment for the plaintiff.

Solicitors: *Lovelace & Hastings; V. Kandiah Palaruntharam.*

PUBLIC PROSECUTOR v. WONG KONG YOONG

[A.Cr.J. (Azmi J.) January 12, 1964]
[J.B. — Criminal Appeal No. 20 of 1963]

Customs and Excise—Customs duty—Attempt at fraudulent evasion—Dutiable articles concealed under articles not dutiable—Whether articles not dutiable subject to forfeiture—Customs Ordinance, 1952, ss. 110(4) & 122.

Articles which were liable to customs duty were placed in a lorry and concealed by 160 bags of poultry food which was not liable to customs duty. On a question whether a forfeiture order could be made in respect of the 160 bags of poultry food under the Customs Ordinance,

Held: as the bags of poultry food were specially arranged to deliberately conceal the dutiable articles they were goods liable to seizure under section 110(4) of the Customs Ordinance and therefore subject to forfeiture under section 122 of the same Ordinance. The prosecution need not show in such a case that the non-dutiable goods were specifically bought for the purposes of concealing the dutiable goods.

CRIMINAL APPEAL.

Wan Hamzah bin Mohd. Salleh (Deputy Public Prosecutor) for the appellant.

Goh Bin Lay for the respondent.

Azmi J.: This is an appeal by the learned Public Prosecutor against the decision of the learned President in ordering the exhibit viz: 160 bags of poultry goods to be returned to the respondent.

The respondent was charged as follows:

"That you, Wong Kong Yoong at about 12.10 p.m. on 29.8.63, at the Customs Import Bays, Customs Compound, Johore Bahru, in Lorry No: BG 3133 with Trailer No: T/B 832, were knowingly concerned in an attempt at fraudulent evasion of Customs duty amounting to $1,016.00 being the duty on 40 packages containing 110 dozen jars 'Tancho' Pure Vegetable Nourishing Pomade Brilliantine, 6 packages containing 60 dozen bottles 'Peacock' Black Hair Dye, 4 packages containing 20 dozen tins 'Yardley' Brilliantine, 2 packages containing 15 dozen tubes 'Tancho Tique' Brilliantine and 10 packages containing 60 dozen packs 'Aladdin 1002' Playing Cards, valued at $2,176.00, thereby committing an offence under section 131(1)(g) of the Customs Ordinance No. 42/52, and punishable under section 131(1)(i) of the same Ordinance."

The respondent pleaded guilty to the charge.

The relevant facts of the case in so far as this appeal is concerned were, according to the learned President's notes of evidence, as follows:

"In the lorry was consignment of poultry food covered by import note — 7510/8 — P.1.

When the tarpaulin was removed the left side of lorry opened up, found poultry food bags were in 2 rows of 12 stacks. The end of each row was one stack of 5 bags and the other end 10 bags. They were arranged in lengthwise and crosswise. A central compartment was formed and in the compartment was found 62 paper parcels covered by a roll of 5 stacks of bags. The 62 parcels were removed and the packing were found: (the particulars of the articles which are the subject matter of the charge)."

The above would appear to be the manner in which the 160 bags of poultry food were arranged in the lorry around and over the numerous bottles of brilliantine and various types of playing cards, etc., valued at $2,176 which were subject to customs import duties (herein referred to as the dutiable articles). Section 122 says that "all goods liable to seizure under the provisions of this Ordinance other than an aircraft engaged on international carriage shall be liable to forfeiture".

Section 110(1) gives a list of goods which may be seized if it can be shown that in respect of any of them there has been, or there is, reasonable cause to suspect that there has been committed an offence against this Ordinance or any regulation made under it. Any receptacle, package, conveyance, vessel not exceeding two hundred tons nett registered tonnage may be seized. Sub-section (4) says as follows:

"The provisions of this section relating to the seizure of goods shall apply to all the contents of any package or receptacle in which the same are found and to any article used to conceal the same."

The question which I have to decide now is whether the 160 bags which have been placed on all sides of the dutiable articles and on top of them come under the provisions of sub-section (4).

The learned President interpreted the words "any article used to conceal the same" to refer only to such goods which were specially procured for the purpose of concealing the dutiable articles and that the prosecution must prove that the goods were there for no other purpose but for the purpose of concealing the dutiable goods. In this case he held the view that it could reasonably be concluded that the accused must have taken the opportunity to smuggle in the dutiable goods hiding them under some of the bags on crossing the customs check. He also said that for the purpose of hiding the dutiable articles 15 bags would be ample.

The learned Deputy Public Prosecutor submitted that it would not be necessary for the prosecution to show that the 160 bags had been procured specially for the purpose of concealing the dutiable articles. In other words, as I understood him, all that the prosecution has to show is merely the fact that such articles in the circumstances of the case have in fact been used to conceal the dutiable articles.

Mr. Goh, who appeared for the owner of the